

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

77-7079

B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

F.X. MALTZ, LTD.

Plaintiff-Appellant

- against -

ROBERT MORGENTHAU, et al.,

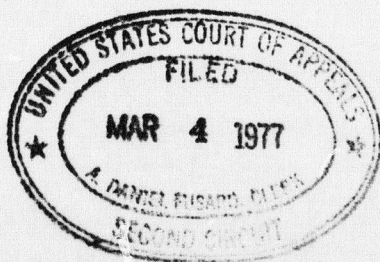
Defendants-Respondents

JOINT APPENDIX

KASSNER & DETSKY
Attorneys for Petitioner-Appellant
122 E. 42nd Street
New York, New York 10017

Robert L. Morgenthau
District Attorney of
New York County
Attorney for Respondent-Appellee
155 Leonard Street
New York, New York 10013

W. Bernard Richland
Corporation Counsel
Attorney for Defendant-Appellee Codd
Municipal Building
New York, New York., 10007



PAGINATION AS IN ORIGINAL COPY

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PLAINTIFFS

F.X. MALTZ LTD.

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DEFENDANTS WYATT J.

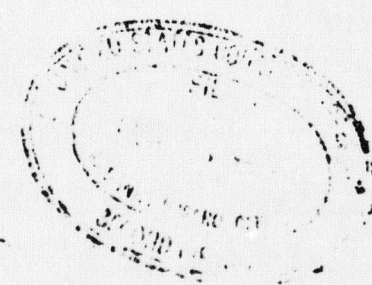
ROBERT MORGENTHAU, Individually
and as District Attorney of the
County of New York, and Michael
Codd, Individually and as Police
Commissioner of the City of New
York

CAUSE 28 USC 1331,1332,1343, 2201 2202
42 USC 1983 1985 1986 and Ruled 57 and
65 of FRCP
to declare sec 140.10 NY Criminal Proceed
Law

ATTORNEYS

Kassner and Detsky
122 E. 42nd St.- Suite 2117
N.Y. N.Y. 10017
661-8190

11-20-19



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66 civ 5416

MALTZ VS MORGENTHAU

Wyatt J.

DATE	NR.	PROCEEDINGS
12-6-76	1	Filed complaint and issued summons.
12-7-76	2	Filed order to show cause for order of preliminary inj. and declaratory judgment ret. 12-10-76 at 2:30 PM
12-6-76	3	Filed memo in support of OTSC.
12-13-76	4	Filed memorandum of deft Morgenthau in opposition to pltffs request etc, as indicated
12-13-76	5	Filed memo endorsed on order to show cause filed 12-7-76. After a hearing in open court, the motion for immediate relief is withdrawn, without prejudice etc, as indicated, Wyatt, J.
1-11-77	6	Filed notice of motion and affidavit for order dismissing complaint ret. 1-21-77 at 10AM.
1-18-77	7	Filed notice of motion for and order dismissing complaint (Rule 12(b) on 1-21-77 at 10AM.
1-24-77		Filed Memo-End on motion filed 1-18-77 The Within Motion is Granted on the same basis as the District Atty.
1-24-77		Filed Memo-End on motion dated 1-11-77. Motion Granted as indicated The clerk is directed to enter judgment for deft.....So Ordered... WYATT.J. m/n
1-26-77	8	Filed Judgment that the defts. Morgenthau, & Codd, have judgment against the pltff. dismissing the complaint....CLERK...Ent. 1/26/77. m/n
1-26-77	9	Filed pltffs/ memorandum of law.
2-9-77	10	File Pltffs. notice of appeal to U.S.C.A. from Judgment Ent. on 1-26-77. Copies Mailed to R. Morgentahau, & Michael Codd, on 2-10-77

(B)

A TRUE COPY
 HARMON H. BURGHARDT, Clerk
 Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-3-

F.X. MALTZ, LTD.,
Plaintiff,

-VS-

ROBERT MORGENTHAU, Individually and as
District Attorney of the County of New York,
and MICHAEL CODD, Individually and as the
Police Commissioner of the City of New York,
Defendants.

CASE NO. 76 Civ 541

JUDGE WYATT

CLERK'S CERTIFICATE

I, RAYMOND F. BURGHARDT, Clerk of the District Court of the United States
for the Southern District of New York, do hereby certify that the certified
copy of docket entries lettered A- B, and the original filed papers
numbered 1 thru 10, and exhibits _____,
inclusive, constitute the record on appeal in the above entitled proceeding; ex-
cept for the following missing documents:

DATE FILED

PROCEEDINGS

17-70-99

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto
affixed, at the City of New York, in the Southern District of New York, this 28TH
day of FEBRUARY, in the year of our Lord, One thousand nine hundred and
seventy SEVEN, and of the Independence of the United States the 201ST year.

Raymond F. Burghardt
Clerk of the Court



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

F.X.MALTZ, LTD.,

Plaintiff,

- against -

NOTICE OF APPEAL

76 CIV. 5416

ROBERT MORGENTHAU, Individually
and as District Attorney of the
County of New York, and
MICHAEL CODD, Individually and as
Police Commissioner of the City
of New York,

Defendants.

-----X

Notice is hereby given that F.X. MALTZ, LTD., a corporation, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment of Judge Inger B. Wyatt, denying plaintiff's application for summary judgment and injunction and granting defendants' motion for dismissal of plaintiff's complaint, which judgment entered in this action on the 26th day of January, 1977.

Dated: New York, New York
February 9, 1977

KASSNER & DETSKY, P.C.

Attorneys for Plaintiff-Appellan
122 East 42nd Street
New York, New York 10017
Tel: 212-682-6600

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
F.X. MALTZ, LTD.,

Plaintiff,

- against -

ROBERT MORGENTHAU, Individually
and as District Attorney of the
County of New York, and MICHAEL
CODD, Individually and as Police
Commissioner of the City of New
York,

Defendants.

-----x
1. Jurisdiction

This complaint for injunctive and declaratory relief is filed, and the jurisdiction of this Court is invoked, pursuant to the provisions of 28 U.S.C. Sections 1331, 1332, 1343, 2201, 2202, and 42 U.S.C. Sections 1983, 1985 and 1986 and Rules 57 and 65 of the Federal Rules of Civil Procedure.

(a) The matter in controversy arises under the Constitution and laws of the United States of America;

(b) The matter in controversy exceeds the sum of Ten Thousand (\$10,000.00) Dollars, exclusive of interest and costs;

(c) This is an action to redress the deprivation, under color of State law, of rights, privileges and immunities secured to the Plaintiffs by the Constitution of the United States of America;

(d) This is an action to have declared unconstitutional on its face and as applied and to enjoin the enforcement, operation, and execution of laws of the State of New York which are codified and appear as Section 140.10 of the New York Criminal Procedure Law (McKinney's Consolidated Laws of New York), hereinafter referred to as the 'Statute';

2. Parties

Plaintiff is a New York corporation and the lessee and operator of a theatre located at 124 West 43 Street, in the Borough of Manhattan, City, County and State of New York.

Defendant Michael Codd is the Police Commissioner of the City of New York and, as such, is responsible for enforcing the laws of the said City and the State of New York within said City.

Defendant Robert Morgenthau is the District Attorney of New York County and is responsible for prosecuting violations of the Penal Law of the State of New York within said County.

Plaintiffs transact business and are found within the Southern District of New York.

3. Statute in Issue

CPL 140.10 provides in part as follows:

- "1. Subject to the provisions of subdivision two, a police officer may arrest a person for:
- (a) any offense when he has reasonable cause to believe that such person has committed such offense in his presence."

4. Grounds for Relief

1. Plaintiff is the lessee and operator of a theatre

located at 124 West 43rd Street, in the Borough of Manhattan, City, County and State of New York, in which has been, is and, hopefully will be exhibited for the entertainment of its patrons sexually oriented feature length motion pictures, expression presumptively protected under the First Amendment of the United States Constitution.

2. In addition to said films, Plaintiff seeks to offer its patrons dance exhibitions performed by professional dancers who will have no function other than to dance on a stage provided for such purpose and thereby entertain the customers of Plaintiff.

3. The said dance performances will involve non-obscene topless and even nude choreographed performances by male and female dancers, expression presumptively protected by the First Amendment.

4. Live dance performances by totally or partially clothed dancers are and have been regularly performed in theatres in midtown Manhattan as part of a total entertainment package including sexually oriented motion pictures.

5. Police officers under the control and direction of defendant Codd have, during the months of September, October and November 1976, continuously entered theatres referred to in "4" above, and, without warrant or prior judicial scrutiny, arrested the dancers in the midst of their performances, thereby halting the performances summarily, causing the patrons to leave and secure reimbursement of their admission fees.

6. The foregoing arrests and prior restraints have been effected pursuant to the provisions of the statute on the alleged basis, urged by defendant Morgenthau, his servants, agents and employees, that police may arrest live dance performers in the midst of their performances and effect a total prior restraint upon the dance performances involved solely upon the ad hoc determinations of such police, without warrant or determination by a disinterested neutral magistrate that the performances are obscene, in violation of the First, Fourth and Fourteenth Amendments

7. The aforesaid procedures have been upheld by the Judges of the Criminal Court of the City of New York as constitutionally valid and thereby encouraged defendants to make scores of such arrests and prosecute scores of such cases against dancers and managers of such theatres.

8. Many of such theatres have been subjected to over one half dozen such arrests in a period of ten weeks, causing dancers to refuse employment in such theatres and patrons to cease patronizing such theatres, thereby chilling the exercise of First Amendment rights.

9. Plaintiff's exercise of its First Amendment right to produce theatrical shows encompassing such live dance entertainment has likewise been chilled by the unlawful arrests, prior restraints and prosecutions under the statute, inhibiting plaintiff and impeding the consummation of plaintiff's desire to offer such live

dance entertainment in its theatre.

10. Dancing presumptively protected by the First Amendment cannot be summarily halted or restrained, nor its exhibitors or performers arrested or prosecuted unless such dancing has first been subjected to judicial scrutiny by a neutral magistrate who has determined the obscenity vel non of the performance and issued a warrant of arrest.

11. By reason of the enforcement of the statute as aforesaid and the implicit threat of the enforcement of the statute against Plaintiff, Plaintiff has failed to offer live nude or partially nude dancing in its premises despite the fact that such dancing is desired to be viewed by its patrons and constitutes expression presumptively protected by the First Amendment.

12. The said threat of enforcement of the overbroad statute which fails to comply in any way with the First Amendment requisites of a speech inhibiting statute as set forth by the Supreme Court of the United States has inhibited the exercise of First Amendment rights by Plaintiff, its prospective dance performers, and its patrons.

13. Plaintiff, having been inhibited from offering the live dance performances heretofore described, has not been and is not presently the subject of a pending criminal prosecution in the State Courts under the statute.

14. The statute is unconstitutionally overbroad as applied to the exercise of First Amendment rights such as the dancing sought to be offered by Plaintiff in its premises in that it effects a total prior restraint upon non-obscene expression presumptively protected by the First Amendment, without prior judicial scrutiny and judicial warrant, in violation of the First, Fourth and Fourteenth Amendments.

15. The sole purpose of enforcing the statute as aforesaid against theatres in Midtown Manhattan is to halt the said performances and effect a total prior restraint upon their exhibition.

16. As a result of the aforesaid threats of prosecution and the resultant refusal of Plaintiff or its dancers to offer the patrons of Plaintiff nude dancing performances, Plaintiff is placed at a competitive disadvantage viz a viz other theatres in the area which are willing to undertake the rigors of criminal prosecution.

17. Plaintiff cannot long continue in business with its patrons who desire to see nude dancing traveling the few blocks to nearby theatres where such dancing entertainment is offered.

18. That the aforesaid enforcement and threat of enforcement of the statute undertaken under color of State Law, has had a deadly, chilling, palling and repressive effect and impact upon the Plaintiff and its patrons.

19. The State of New York is not free to legislate nor are Defendants free to apply such legislation in a manner in direct contravention of First and Fourteenth Amendment standards laid down in constitutional decisions by the Supreme Court of the United States and thereby withdraw from the realm of constitutional protection matter presumptively and actually within its protected orbit.

20. The foregoing enforcement of the statute compels an insidious system of self-censorship which results in Plaintiff's refusal to allow the performance of non-obscene topless and nude dancing for fear of the threatened unlawful arrests, prior restraint and prosecutions destructive of its business.

21. Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff demands judgment against Defendants for the following relief:

1. For an order appointing and convening a three-Judge District Court pursuant to Section 28 U.S.C. 2281 and 2284.

2. For declaratory judgment that Section 140.10 of the Criminal Procedure Law of the State of New York is unconstitutionally violative of the First, Fourth and Fourteenth Amendment on its face and as applied to expression presumptively protected by the First Amendment.

3. For a preliminary injunction prohibiting the Defendants, their agents and employees and all other persons within their

control, from enforcing Section 140.10 of the New York Criminal Procedure Law or making any arrest pursuant thereto without first obtaining a warrant from a judicial officer who has viewed the performance and determined the obscenity vel non thereof.

4. For an order permanently enjoining the Defendants, their agents, employees and all other persons within their control from enforcing Section 140.10 of the Criminal Procedure Law of the State of New York with respect to expressive matter presumptively protected by the First Amendment, by arresting dancers and halting their performances without first obtaining a warrant issued by a judge after scrutiny by such judge of the performance and determination of the obscenity vel non thereof.

5. Awarding the Plaintiff the costs of this action.

Dated: New York, New York
December , 1976

KASSNER & DETSKY, P.C.
Attorneys for Plaintiff
Office & P.O. Address
122 East 42nd Street
New York, New York 10017
Tel: 212 682-6600

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

F.X. MALTZ, LTD.,

Plaintiff,

- against -

ROBERT MORGENTHAU, Individually
and as District Attorney of the
County of New York, and MICHAEL
Codd, Individually and as Police
Commissioner of the City of New
York,

Defendants.

ORDER TO SHOW CAUSE
FOR ORDER ~~CONVENING~~ OF
~~THE~~ PRELIMINARY INJUNCTION
DECLARATORY JUDGMENT
76 CIV 5416 (IBW)

UPON A COPY of the complaint and affidavits of HERBERT

S. KASSNER, and ERNESTO VELAZQUEZ, annexed hereto, it is

ORDERED that the Defendants above named show cause at a
Term of this Court appointed to be held at the United States

District Courthouse, located at Foley Square, New York on the

10th day of December, 1976 at 2:30 P.M. of that day or as

soon thereafter as counsel can be heard, in Room 1506

WHY an order should not be made as follows:

1. Granting Plaintiff's declaratory judgment that
New York Criminal Procedure Law Section 140.10 is unconstitutional
on its face and as applied to the dance, expression presumptively
protected by the First Amendment, in that:

a. The Statutes suffers from overbreadth in

violation of the First and Fourteenth Amendment of the United States Constitution;

b. CPL 140.10 authorized the arrest of dancers in the midst of their performance of presumptively protected expression and the consequent summary suppression and cessation of such performances without a warrant issued by a neutral magistrate after judicial scrutiny and determination by such magistrate of the obscenity vel non of such performance, all in violation of the First, Fourth and Fourteenth Amendments of the United States Constitution.

2. Enjoining Defendants, their agents, servants and employees and any parties acting in concert with them, pending the determination of this action for declaratory judgment from arresting dancers in plaintiff's theatre or prosecuting any criminal prosecutions affecting Plaintiff and live dance performers in plaintiffs theatre under Section 140.10 of the New York Criminal Procedure Law without a warrant issued by a judge who has viewed the performance and determined the obscenity vel non thereof.

ORDERED, that personal service of a copy of this order and the papers upon which the same is granted, upon Defendants or their attorneys on or before the 7th day of December, 1976 by noon shall be sufficient service of this order.

Dated: New York, New York

December 6th, 1976

Irving Blechman
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
F.X. MALTZ, LTD.,

Plaintiffs,

ROBERT MORGENTHAU, Individually and
as District Attorney, and
MICHAEL CCDD, Individually and as
Police Commissioner of the City of
New York,

Defendants.
-----X

STATE OF NEW YORK)
 :
COUNTY OF NEW YORK)

SS.:

ERNESTO VELAZQUEZ, being duly sworn, deposes and says:

I am the Manager of F.X. Maltz Ltd., the operator
of the theater known as the Hudson Theater, located at 124
West 43rd Street in the Borough of Manhattan, City, County, and
State of New York.

For a number of years the theater has operated under a policy of

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exhibiting sexually oriented films to forewarned consenting adults.

Approximately four years ago the burlesque houses in the midtown area of the City of New York began adopting a policy of totally nude dancing. To the best of my knowledge there has been little or no police enforcement of the obscenity laws of the State of New York with respect to those premises.

Approximately two years ago a good number of bars in midtown Manhattan who had been offering live, topless dance entertainment to their patrons, adopted a policy of totally nude dancing. This was followed by the establishment of premises not engaged in the sale of alcoholic beverages which likewise offered totally nude dancing entertainment for their patrons.

Needless to say, the foregoing proliferation of sexually oriented live dance performances in the midtown area of the Borough of Manhattan began draining off patronage from theaters engaged in the exhibition of sexually oriented films.

By reason of the foregoing, within the past year, a number of theaters in the midtown area of Manhattan engaged in the exhibition of sexually oriented films adopted a policy of incorporating live topless or nude entertainers into their program.

As a result of the foregoing, and beginning in September, 1976, police officers of the City of New York commenced a series of repetitive, multiple, harrassing arrests of dancers and various other employees of motion picture theaters in midtown Manhattan which had incorporated live dance performances in their program. These arrests were conducted without

warrant, interrupted dance performances which were in progress, and resulted in temporary closure of the theater and the necessity to reimburse patrons their admission fees. No prior judicial scrutiny of the dance performances preceded the arrests. Dancers and supervisory employees at the theater were charged with promoting obscenity in violation of Section 235 of the Penal Law of the State of New York. Attempts to have the proceeding dismissed for violation of First, Fourth and Fourteenth Amendment rights against prior restraint were rejected by the judges of the Criminal Court of the City of New York. Pleas of guilty were entered to reduced charges, and fines ranging up to one hundred dollars (\$100.00) were paid as an alternative to costly trials.

Dancers became reluctant to perform in the theater. Managers have become reluctant to work in the theater. Patrons have become reluctant to enter the theater. A chill overhangs the exercise of First Amendment rights.

From the foregoing it should be apparent that patrons of sexually oriented films and performances are no longer satisfied with the mere viewing of a motion picture. Our business at the theater has diminished considerably in the face of the competition of the live dance performances exhibited in burlesque houses, bars, theaters, and other premises throughout the midtown area. It is our desire to offer our patrons live dance performances by professional dancers performing choreographed routines. We do not, however, desire to expose ourselves, our performers, and our patrons to the harrassment of warrentless arrests and prior restraints resulting from ad hoc

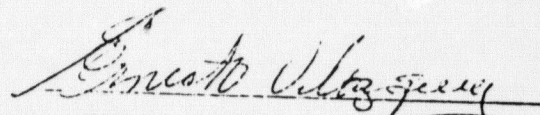
determination of police officers without prior judicial scrutiny. We have been advised by our attorneys that live dance performances constitute expression presumptively protected by the First Amendment and subject to all of the safeguards from prior restraint inherent in such protection. We are further advised by our attorneys that the arrest of a dance performer in the midst of her performance constitutes a prior restraint in violation of the First, Fourth and Fourteenth Amendments of the United States Constitution unless such arrest is pursuant to a warrant issued by a neutral magistrate who has first observed the dance performance and determined the obscenity vel non thereof.

We, therefore, have elected to petition this court for a determination that Section 140.10 of the Criminal Procedure Law of the State of New York, which authorizes a police officer to make an arrest without a warrant when he has reasonable cause to believe that a person has committed an offense in his presence, is unconstitutionally violative of the First, Fourth and Fourteenth Amendments of the United States Constitution when applied to a factual situation involving the arrest by a police officer of a dancer in the midst of her performance solely on the basis of such police officer's ad hoc determination that the performance is obscene in violation of Section 235 of the Penal Law of the State of New York.

Since plaintiff is suffering severe loss of its patronage by virtue of its failure to offer such dance performances as a result of the chill in exercise of First Amendment rights resulting from the enforcement by

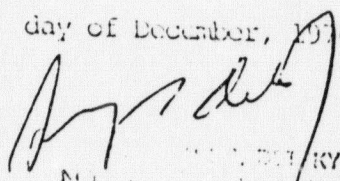
defendants of the aforesaid state, it is imperative that preliminary relief be granted so that plaintiff can commence offering the dance exhibitions without fear of summary arrest without prior judicial scrutiny.

No prior application has been made for the relief sought herein.


ERNESTO VELAZQUEZ

Sworn to before me this

6th day of December, 1976


NOTARY
New York

Notary Public
in and for the County of
New York
1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-x

F.X. MALTZ, LTD.,

Plaintiff,

- against -

ROBERT MORGENTHAU, Individually and as
District Attorney, and MICHAEL CORD,
Individually and as Police Commissioner
of the City of New York,

Defendants.

-x

STATE OF NEW YORK)

COUNTY OF NEW YORK)

SS.:

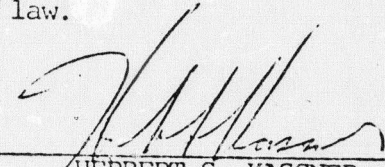
HERBERT S. KASSNER, being duly sworn, deposes and says:

I am a member of the firm of Kassner & Detsky, P.C., attorneys for plaintiff herein, and familiar with the facts in the instant proceeding, and make this Affidavit in support of plaintiff's motion for the convening of a three judge court and for preliminary injunctive relief.

As is clear from the annexed Affidavit of Paul Alicea, Jr.,

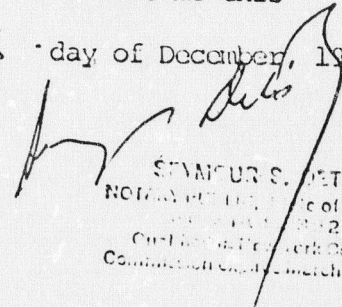
the threat of warrantless arrests in the midst of a live dance performance. This is apparent by virtue of the fact that plaintiff fears to exhibit such performances in its theater and is willing to undergo the cost, expense, and delay of the instant proceedings rather than suffer the multiple, harassing arrests under the statute were it to commence offering such live dance performances in its theater.

It is respectfully submitted that an expeditious determination of the constitutional issue raised herein is not only desirable but demanded by the fundamental principles of First Amendment law.


HERBERT S. KASSNER

Sworn to before me this

3 day of December, 1976


SEYMOUR S. JITSKY
Notary Public, State of New York
No. 1234567
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
F. X. MALTZ, LTD.,

Plaintiff

-against-

:
:
:
: NOTICE OF MOTION

ROBERT MORGENTHAU, Individually :
and as District Attorney of the :
County of New York, and MICHAEL :
Codd, Individually and as Police :
Commissioner of the City of New :
York, :

76 Civ. 5416
(IBW)

Defendants.
-----X

SIRS:

PLEASE TAKE NOTICE, that upon the annexed Memorandum of Law, and the prior proceedings and papers herein, the undersigned will move this Court at a motion term thereof to be held on January 21, 1977 at the United States Courthouse, Foley Square, New York, New York at 10:00 A.M. or as soon thereafter as counsel can be heard, for an order dismissing the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure upon the ground that the complaint fails to state a claim upon which relief can be granted and for such other and further relief which the Court may deem just or proper.

Yours, etc.

ROBERT M. MORGENTHAU
District Attorney
New York County
155 Leonard Street
New York, New York 10013
(212) 732-7300

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DAVID RAPAPORT
Assistant District Attorney
Of Counsel

TO: KASSNER & DETSKY, P.C.
Attorneys for Plaintiff
122 East 42nd Street
New York, New York 10017
(212) 661-8190

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Defendant Codd
The Municipal Building
New York, New York 10007
(212) 566-2842
Attn. John W. Russell, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

F. X. MALTZ, LTD.,

Plaintiff,

-against-

ROBERT MORGENTHAU, Individually
and as District Attorney of the :
County of New York, and MICHAEL
Codd, Individually and as Police
Commissioner of the City of New :
York,

Defendants.

-----x
SIRS:

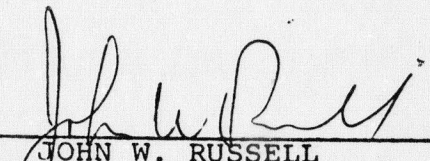
PLEASE TAKE NOTICE, that

the

undersigned will move this Court at a motion ~~term~~ thereof to
be held on January 21, 1977 at the United States Courthouse,
Foley Square, New York, New York at 10:00 A.M. or as soon
thereafter as counsel can be heard, for an order dismissing
the complaint pursuant to Rule 12(b)(6) of the Federal Rules
of Civil Procedure upon the ground that the complaint fails
to state a claim upon which relief can be granted and for such
other and further relief which the Court may deem just or proper.

Yours, etc.

W. BERNARD RICHLAND
Corporation Counsel
of the City of New York
Attorney for Defendant Codd
The Municipal Building
New York, New York 10007
(212) 566-2842
Attn: John W. Russell, Esq.



JOHN W. RUSSELL
Assistant Corporation Counsel

TO: KASSNER & DETSKY, P.C.
Attorneys for Plaintiff
122 East 42nd Street
New York, New York 10017
(212) 661-8190

ROBERT M. MORGENTHAU
District Attorney
New York County
155 Leonard Street
New York, New York 10013
(212) 732-7300

Herb Wassner

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
F.X. MALTZ, LTD.,

Plaintiff,

-against-

ROBERT MORGENTHAU, individually,
etc. MICHAEL CODD

Defendants.
----- X

Handwritten endorsement of
WYATT, J. (Not totally
legible)

Docket #76-5416 (IBW)

The motion is granted. There is nothing to show that if plaintiff employs nude dancers they would violate the law by obscene performances or that if they do the police will arrest them. If despite my views there is a case or controversy, I find the statute constitutional on its face and as applied in the case of plaintiff operators. At the request of plaintiffs and over the objections of defendants, I assume that plaintiff made a motion for summary judgment and such motion is denied. The Clerk is directed to enter judgment for defendants.

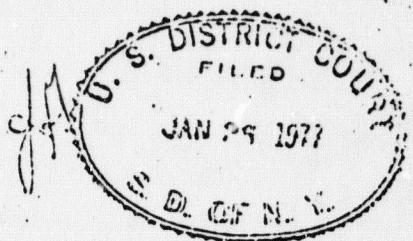
SO ORDERED

/s/ I.B.W.

Jan. 21, 1977

Wyatt, J.

(8)



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
F. X. MALTZ, LTD. : 76 Civil 5416 (IBW)

Plaintiff :

-against-

: JUDGMENT

ROBERT MORGENTHAU, individually and as :
District Attorney of the County of New York, and
MICHAEL CODD, individually and as Police :
Commissioner of the City of New York

:
Defendant ----- X

Defendants having moved the Court, pursuant to Rule 12(b)(6), of the Federal Rules of Civil Procedure, and the said motions having come on to be heard before the Honorable Inzer B. Wyatt, United States District Judge, and the Court thereafter on January 24, 1977, having handed down its memorandum endorsement granting the said motions, it is,

ORDERED, ADJUDGED and DECREED: That defendants ROBERT MORGENTHAU, individually and as District Attorney of the County of New York, and MICHAEL CODD, individually and as Police Commissioner of the City of New York, have judgment against plaintiff F. X. MALTZ, LTD., dismissing the complaint.

Dated: New York, N. Y.
January 26, 1977

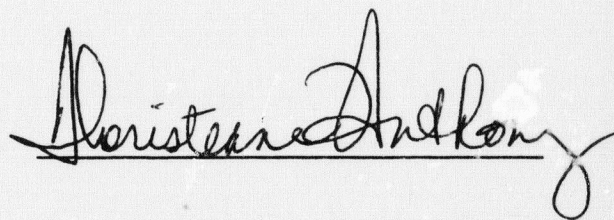
Raymond F. Bergant

Clerk

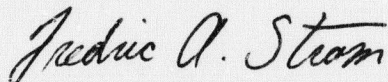
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STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

FLORISTEANE ANTHONY, being duly sworn, deposes and says;
that deponent is not a party to the action, is over 18
years of age and resides at 122 East 42nd Street, New
York, New York 10017. That on the 4th day of March,
1977, deponent served the within Appendix and Brief
upon Robert L. Morgenthau and W. Bernard Richland, attorneys
for Defendants-Respondents in the within action at 155
Leonard Street, New York, New York 10013 and Municipal
Building, New York, New York 10007 respectively the address
designated by said attorneys for that purpose by depositing
a true copy of same enclosed in a postpaid properly addressed
wrapper, in an official depository under the exclusive care
and custody of the United States Post Office Department of
within New York State.



Sworn to before me this
4th day of March, 1977



FREDRIC A. STROM
Notary Public, State of New York
No. 31-4639002
Qualified in New York County
Commission Expires March 30, 1978